

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
JOSEPH J. MAHAR AND RHEA M. MAHAR	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law for the Years 1978 through 1982	:	

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Petitioners, Joseph J. Mahar and Rhea M. Mahar, 106 Normanor Drive, Syracuse, New York 13207, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1978 through 1982 (File No. 801261).

On April 18, 1987, petitioners waived a hearing and submitted the matter for determination based upon the Division of Taxation file, as well as additional documents to be submitted by July 15, 1987. After due consideration of the record, Daniel J. Ranalli, Administrative Law Judge, hereby renders the following determination.

ISSUES

I. Whether the Audit Division's use of the markup method of indirect audit was proper for determining income tax deficiencies.

II. Whether the adjustments made as the result of employing such audit method were proper.

FINDINGS OF FACT

1. Petitioners, Joseph J. Mahar and his wife, Rhea M. Mahar, filed a joint New York State Resident Income Tax Return for each of the years 1978 through 1982, inclusive, whereon Mrs. Mahar reported net business income derived from Mahar's Grill as follows:

<u>Year</u>	<u>Net Profit or (Loss)</u>
1978	\$4,397.00
1979	\$5,152.00
1980	\$5,983.00
1981	\$4,475.00
1982	(\$2,887.00)

2. On January 15, 1984, the Audit Division issued three statements of audit changes to petitioners wherein adjustments were made for additional income derived from Mahar's Grill, as follows:

<u>Year</u>	<u>Additional Income</u>
1978	\$14,129.00
1979	\$11,967.00
1980	\$ 358.00
1981	\$ 7,396.00
1982	-0-

Adjustments were also made each year disallowing certain claimed rental expenses.

3. Based on the aforesaid adjustments, the Audit Division issued three notices of deficiency against petitioners on April 6, 1984, as follows:

(a) against Mr. and Mrs. Mahar asserting additional personal income tax for 1978, 1979 and 1980 of \$3,226.35, plus penalty of \$161.32 and interest of \$1,548.82, for a total due of \$4,936.49;

(b) against Mr. and Mrs. Mahar asserting additional personal income tax for 1981 and 1982 of \$1,113.93, plus penalty of \$55.70 and interest of \$242.13, for a total due of \$1,411.76;

(c) against petitioner Rhea M. Mahar asserting unincorporated business tax for the years 1978 and 1979 of \$804.99, plus penalty of \$40.25 and interest of \$396.41, for a total due of \$1,241.65. The aforesaid penalties were asserted for negligence pursuant to Tax Law § 685(b).

4. The adjustments for additional income were based upon a sales tax markup audit conducted by the Audit Division. The resulting additional gross receipts of Mahar's Grill were determined to be additional income for personal income and unincorporated business tax purposes.

5. Petitioners reported losses each year from the rental of fields. Accordingly, the Audit Division disallowed rental expenses claimed for insurance, utilities, telephone and depreciation for all years at issue since petitioners leased only the land and not the buildings located on the property. Petitioners did not contest these adjustments.

6. At a prehearing conference the Audit Division adjusted the amount of additional income from Mahar's Grill for each year at issue to \$10,496.00 (1978); \$7,465.00 (1979); \$4,256.00 (1980) and \$5,069.00 (1981). Said adjustments were based in part on changes made to the markup percentage applied to the food purchases of Mahar's Grill during the years at issue.

7. As the result of the aforesaid prehearing conference, the additional tax due has been revised as follows:

	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>
Personal Income Tax	\$1,071.00	\$860.00	\$193.00	\$729.00	\$86.00
Section 685 (b) Penalty	54.00	43.00	-0-	36.00	4.00
Unincorporated Business Tax	284.00	138.00	-0-	-0-	-0-
Section 685 (b) Penalty	14.00	7.00			

8. Petitioners submitted additional documentation to show that Mr. Mahar received several thousand dollars in Veterans Administration benefit payments during the years at issue. Other documentation of nontaxable personal receipts was submitted with respect to 1983, which is not at issue herein.

9. No documentation was offered by petitioners to refute the markup audit conducted.

#### CONCLUSIONS OF LAW

A. That the notices of deficiency issued with respect to taxable years 1978 and 1979 were issued subsequent to the expiration of the three year period of limitations on assessment. However, such notices were issued with respect to said years pursuant to Tax Law § 683 (d)(1), which provides for a six year period of limitations on assessment where, as in the instant case, petitioners omitted from their New York adjusted gross income an amount properly includible therein which is in excess of 25 percent of the amount of New York adjusted gross income

reported.

B. That petitioners' submission of documentation respecting Veterans Administration benefit payments is irrelevant since such documentation is of no moment in a markup audit.

C. That petitioners have failed to sustain their burden of proof pursuant to Tax Law § 689(e), to show that the Audit Division's use of the markup audit method, or the results determined therefrom, were improper or erroneous.

D. That nowhere in the Tax Law or regulations is the Audit Division precluded from utilizing an indirect audit method commonly used in reconstructing income under one article of the Tax Law, in an audit conducted under another article of the Tax Law.

E. That the petition of Joseph J. Mahar and Rhea M. Mahar is granted to the extent indicated in Findings of Fact "6" and "7"; that the Audit Division is directed to modify the three notices of deficiency issued April 6, 1984 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
November 13, 1987

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ADMINISTRATIVE LAW JUDGE